

Transforming the Law of Freedom of Expression

Asalam Alaykum (ah-sa-lahm ah-lay-coom)

Thank you, _____, for your kind introduction, and thank you all for welcoming me to this important conference. I have enjoyed meeting each of you and have been humbled by your hospitality. I have learned much from you in my short time here. I hope that each of you has likewise had a productive conference and that some of the information we have shared in our time together will assist you in confronting the many challenges you face every day.

When Attorney General Holder visited last July, he expressed his hope that our two nations could work together to effectively and collaboratively respond to evolving global challenges. It is my most sincere wish that the friendship and partnership between our two countries continues to flourish and grow. Having met with you, the nation's leaders and legal experts, I am confident that Malaysia's voice on global issues of liberty and justice will resonate throughout the international community.

Today, I have been asked to speak to you about an issue that challenges every democratic nation; namely, how does a government grant all of its citizens the right to think, believe, pray, write, or speak as their conscience dictates, while still maintaining a peaceful society that protects all of its members?

It is easy, in the abstract, to applaud the universal principles of freedom, justice, liberty, and equality. These are indeed some of the most noble ideals to which humankind aspires. But all of us who have had the privilege of serving in government know that it is difficult to take these principles and apply them – really apply them – to governing a country.

Every country struggles to translate these principles into policies and legislation. The exact challenge each of us confronts stems from our nation's own particular history and culture. But what binds all free nations together is the fact that we embrace this struggle and seek to make these great principles manifest in how we govern.

It is with this in mind that I want to tell you a little about America's historic struggles. I hope you may learn something from our experience, just as I have been learning – throughout this conference -- from your description of your own experiences.

On the one hand, the United States has a long history of respecting equality and liberty. Enshrined in one of our most revered founding documents are the words, “we hold these truths to be self-evident, that all men are created equal.” This document, our Declaration of Independence from Great Britain, goes on to state that every man is “endowed by his creator” with certain unalienable rights, including the “right to liberty.” These are universal principles, and I am sure that you can relate to them, just as you can relate to the idea of declaring independence from Great Britain!

Yet, despite this early and solemn commitment to liberty and equality, the United States has struggled mightily to secure these liberties to each and every one of its citizens. Sadly, at the time of the nation's founding in the 18th Century, slavery was legal in the United States. And the promise of liberty and equality so eloquently stated in our founding documents remained out of reach, not only for slaves but for women, Native Americans, and even men too poor to own land, who did not have the right to vote or hold office. But slowly, over the next two-hundred and forty years, America's promise of liberty and equality came closer and closer to full realization.

The United States was able to become more inclusive not because we changed our principles, which reflect universal and timeless values, but because we learned to apply our principles more consistently. Over time, we also developed tools that help us to better apply our principles. As the head of the Civil Rights Division of the Department of Justice, I have the honor of enforcing many of the most important tools, including our nation's civil rights laws.

The Civil Rights Division was established during a particularly challenging time in my nation's history. Nearly a century after slavery was abolished in the United States, African Americans continued to be treated as second class citizens. African Americans, for example, had the right to vote, but were often either denied this right by local officials or intimidated through violence and threats of violence not to dare exercise it. Throughout the Southern states, black children went to black schools and white children to white schools. Despite the requirement of equal protection of the law in our Constitution, this segregation was tolerated under the legal fiction of "separate but equal."

However, in the first half of the 20th century there was a growing consciousness that the pervasive discrimination against African Americans was a profound moral wrong. This culminated in dramatic change. In 1954, the Supreme Court of the United States unanimously held that the constitutional mandate for equal treatment under the law did in fact mean equal for all citizens and ordered the integration of American schools. Three years later, the Civil Rights Division was created. Our initial mandate was to prosecute cases of attacks on African Americans asserting their rights, which local officials in the South would not investigate or prosecute. The work has expanded over the past sixty years so that it now includes work to end discrimination on the basis of race, religion, sex, color, and national origin in housing, education,

and the workplace, including for persons with disabilities; protect the right to vote; preventing a discriminatory policing and inhumane conditions of confinement; and working to enforce numerous other protections, as I will talk about more in a moment.

It is humbling to see how far my nation has come in my own lifetime to bring the promise of the founders to each and every person who call America home. It is with great pride that I recognize how much the work of the Civil Rights Division has contributed to the realization of this goal.

One particular aspect of liberty that has long been at the core of American beliefs since our founding has been the liberty of conscience and belief. Thomas Jefferson, one of our nations' founders, said that "[a]mong the most inestimable of our blessings is that ... of liberty to worship our Creator in the way we think most agreeable to His will." Our first President, George Washington, wrote in a famous letter to a Jewish congregation in which he stressed that religious freedom was a fundamental right that belonged to all people, not a privilege bestowed by one class of people upon another. Perhaps even most significantly, the Constitution of the United States, the fundamental blueprint for how our nation is governed, grants every citizen the right to worship freely. America is thus committed to the principle that practitioners of Christianity, Judaism, Islam, Buddhism, Hinduism, and any other religion must be treated equally under the law and that their right to worship must be protected.

The American Founders, leading a country that was home to a wide diversity of religious beliefs, sought to protect conscience by putting into the First Amendment of the U.S. Constitution a provision forbidding the government from interfering in religious matters, and protecting the free exercise of religion. Similarly, recognizing that a critical aspect of freedom of

conscience is the ability to share one's views, both religious and nonreligious, with others, the First Amendment also contains protections for speech, press, and assembly, as well as the right to petition the government.

Sometimes the goals of seeking a society that is truly equal for all regardless of color, race, religion, national origin, gender, or disability can seem to conflict with the goal of protecting conscience and expression. There will always be those, for example, who use their right to free speech to say reprehensible things to others, creating divisions along racial, ethnic, or religious lines.

But, in our experience, the fundamental rights of equality on the one hand and speech and conscience on the other can work side by side. I will describe shortly how protections for free speech and expression coexist with well defined tools to protect racial, religious, or ethnic minorities. In fact, freedom of speech in our historical experience in the United States was critical to the achievement of equality. Civil rights were established in the United States not merely because our Congress passed the Civil Rights Act, although this was very important. But, far more important was the fact that every day Americans turned on their radios and televisions and heard the words of Dr. King and other civil rights leaders. Their words and deeds persuaded many Americans that "separate but equal" is not in fact equal, and that it was time for change. In fact, there were many who thought the words of Dr. King and other civil rights leaders dangerous, and sought to ban them as disturbing the peace in communities where majorities of whites wanted to perpetuate racial segregation. This issue went all the way to our Supreme Court, which ruled in the case of *New York Times v. Sullivan* that an official in Alabama could not sue civil rights advocates over an advertisement that made negative statements about the police. Our First Amendment permitted civil rights advocates to speak out,

preach freely from church pulpits, and march in the streets. Going back further in history, the abolition of slavery was accelerated by the exhortations of preachers from pulpits and the writings of abolitionist pamphleteers. The rights to vote for women in the U.S. came through tireless agitation and protest.

Free speech can sometimes even serve the cause of equality and harmony when the motive of the speaker is the complete opposite. Despite the long history of racism in America that I described earlier, our Courts have held that the First Amendment permits white supremacists to march through Jewish and African-American neighborhoods wearing offensive symbols that express their hateful beliefs. While some have questioned why this sort of speech should be protected, in the United States we have found almost invariably that public expressions of hateful beliefs draw larger and more powerful expressions of racial and religious equality and harmony. You will see, for example, a march by neo-Nazis that draw a dozen or so participants met with a peaceful interfaith vigil of hundreds of counter-demonstrators.

I saw this phenomenon first hand recently in Murfreesboro, Tennessee. There, a Muslim community that had been worshipping for more than 20 years in cramped office space had raised money and bought property to build a larger, free-standing mosque. When local officials approved the new mosque, there was agitation and protest by many local residents against it. But the protesters were met with interfaith rallies in support of the mosque. Mosque opponents brought a lawsuit in state court to stop the mosque, but we at the Justice Department brought a federal civil rights lawsuit that paved the way to allow them to move into the mosque in time for Ramadan this past August. The imam of the mosque, Sheikh Osama Bahloul, received hate mail, but told me that for every negative comment, he has received many more in support. Indeed, the controversy over the mosque led to a lot of good publicity, and Sheikh Osama has

received letters of support and contributions of money for the mosque from people throughout the United States, including many soldiers serving in Afghanistan. I recently attended the mosque's grand opening ceremony, and was heartened by the interfaith support of the Catholic Archbishop, Protestant Christian preachers, Jewish leaders, and many others at the event. As the United Nations Human Rights Council expressed in resolution 16/18, "the right to freedom of opinion and expression" plays an important role "in strengthening democracy and combating religious intolerance."

Democracy can be a messy business, but just as we believe that the leaders people choose will govern better than any absolute ruler, so too do we believe that the ideas that will emerge through the messy interchange of ideas will be preferable to ideas dictated and controlled by the government. A famous U.S. Judge named Learned Hand (a curious name, I will grant you) said it well when he said, "The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."

I want to emphasize, however, that the fact that in America, we have very high protections for free speech and other free expression, does *not* mean we are powerless to protect racial, religious, or ethnic minorities. We are not. First, and foremost, we can – and most assuredly do – punish anyone who uses actual violence to express their hatred. Free speech is not a license to assault or kill or to engage in acts of vandalism.

Second, we can – and most assuredly do—punish threatening conduct. The Courts have held that the First Amendment does *not* allow bigots, in the name of free speech, to terrorize others by threatening to initiate future violence. Now, not every ugly bigoted thing that someone says is a threat that is punishable under our laws. To be punishable, the statement must

be what the courts call a true threat, a *serious* threat to commit an unlawful act of violence, as opposed to efforts to annoy or engage in political hyperbole.

There are many laws, both at the state and federal level, which prohibit and severely punish, violence and threats of violence committed with a bias motivation. We enforce such laws in the Civil Rights Division, and enforce them vigorously. We refer to them shorthand as “hate crimes,” but they require, in addition to a bias motivation, acts of violence or the threat of violence.

For example, we recently prosecuted three neo-Nazis who spraypainted “white pride” and swastikas on a mosque in Columbia, Tennessee, then burned it to the ground. They received sentences of 14, 15, and 6 years, respectively. After the 9/11 terror attacks, we saw a sharp rise in attacks against Muslims and Arabs, as well as South Asians and Sikhs who were mistaken as being Muslim because of their distinctive turbans. The number of hate crimes against Muslims is down significantly from where it was in the months after 9/11, but it is still about 5 times what it was before 9/11, at around 150 incidents per year. This is not a large number in absolute terms--to put this in perspective, this number is smaller than the number of hate crimes against Jews in the U.S., even controlling for the differences in populations. Nonetheless, there are still too many of these crimes, and we continue to aggressively prosecute them. I also want to emphasize that while my job is to prosecute cases when things go wrong in America, so much is going right with the Muslim community. There are an estimated 2 to 3 million Muslims in the United States, worshiping in more than 2,000 mosques. Muslims are well integrated into American society, and enjoy a high level of prosperity. Polls show that 82% of Muslims in the U.S. are satisfied with their lives, a number that is slightly higher than the number for the general population. But the same polls show Muslims in the U.S. are also very concerned about

discrimination, and we remain committed to combating hate crimes and discrimination.

Our hate crime cases are not limited to violence and destruction of property. As I noted, we do not hesitate to prosecute real threats of violence. Thus we prosecuted a man in Philadelphia who placed an anonymous note on the chair of his supervisor at work, saying that she and her family would be harmed because she was Arab and Muslim. And while I noted above that my friend Sheikh Osama in Tennessee has endured some hateful mail along with all of the supportive mail and messages he has received, he does not have to endure threats. We are currently prosecuting a man from the state of Texas who left a phone message at his mosque saying that he would blow up the mosque.

Free speech likewise is not a license to harass or discriminate, and our civil rights laws protect individuals from discrimination and harassment in schools, the workplace, housing, and other areas.

For example, civil rights laws guarantee nondiscrimination in education, and this means being able to learn in an environment free from harassment based on race, religion, gender or ethnicity. The Civil Rights Division has brought and won cases where schools have failed to take action to prevent harassment, such as a case involving a young girl in the state of Delaware who was teased severely by other students because her mother wore a hijab. In addition to stopping harassment, the Civil Rights Division has used free speech and freedom of religion principles to promote greater harmony in the schools. We have fought for the right of Muslim students in Texas to gather for midday prayer, and Christian students in Pennsylvania to gather for Bible studies, all on the principle that the school had permitted students to gather for nonreligious activities, and thus could not discriminate against religious activities. Likewise we

won the right for a Muslim girl in Oklahoma to express her faith by wearing a headscarf to school. While the wearing of headscarves in school is typically not controversial in the United States, where a school tries to prevent it, we stand ready to intervene.

We also bring suits to protect against discrimination and harassment in the workplace. Free speech does not extend to the act of creating a work environment that is pervasively and severely hostile to persons because of their race, religion, sex, or national origin. The Civil Rights laws also protect the right of people to express their faith in the workplace, and thus we have won suits allowing Muslim and Sikh bus and subway drivers to wear headscarves and turbans with their uniforms, and similar suits.

Likewise we protect the ability of people to buy or rent houses and apartments without facing discrimination. U.S. law prohibits persons from interfering with others' housing rights, and we have brought suits against a man in Illinois for harassing a neighbor because he was Jewish, and against a public housing development in San Francisco that did not take action to prevent tenants from harassing other tenants who were Muslim and Arab. While someone is free under the First Amendment to criticize Christians, Jews, or Muslims, they are not permitted to deny people their right to equal access to housing by pervasive and severe harassment.

Our enforcement of equality through the civil rights laws are thus interwoven with our protections for freedom of conscience, religion, and expression. Each protection strengthens and serves the other. Our laws protect individuals from violence, harassment and discrimination based on race, religion, and similar characteristics. But true national harmony cannot exist if people are not protected and ensured equal opportunity. Authentic harmony similarly requires discussion, learning, and exchange of ideas. Our civil rights laws alone, without the moral

message of Martin Luther King and other leaders becoming part of the public debate and then part of the public consciousness, could not have so dramatically transformed our society over the past forty years. Free speech can be messy, it can interject uncertainty, but ultimately it has been our experience that it is an absolute necessity to achieving real national harmony. And just as harmony in music is not achieved when everyone sings the same note, we do not expect everyone to espouse the same ideals. We achieve harmony when we are able to respect our differences – and differences of opinion – and to enforce our laws in consonance with the principles we share.

Similarly, I know that you do not share all of the same ideas that I have spoken about today. But I hope my reflections on the American experience may provide you with some ideas that will be helpful to your efforts in Malaysia. I look forward to your questions, and to learning more from each other.

Thank you.